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Nelson

SUPREME COURT OF THE UNITED STATES.

No. 67.

JOHN HECKER AND GEORGE V. HECKER, PLAINTIFFS IN ERROR,

vs.

JOHN FOWLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argd Dec 9/64
Judgt affirmed

801

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No.

JOHN HECKER AND GEORGE V. HECKER, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT:

Pleas before the justices of the circuit court of the United States for the southern district of New York, in the second circuit, at 41 Chambers street, in the city of New York, of the term of June, one thousand eight hundred and sixty-one, to wit, on the 20th day of June, one thousand eight hundred and sixty-one.

Witness, Hon. Wm. D. Shipman, Justice.

KENNETH G. WHITE, *Clerk*.

Southern district of New York, *ss:*

Be it remembered, that on the 15th day of September, in the year of our Lord one thousand eight hundred and fifty-nine, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, No. 41 Chambers street, in the city of New York, in the said southern district, came John Fowler, plaintiff, by H. and C. S. Andrews, his attorneys, and brought into the said court before the aforesaid judges thereof then and there against John Hecker and George V. Hecker, defendants, his certain declaration of a plea of trespass, which said declaration is in the words and figures following, to wit:

2 John Fowler, who is a subject of Victoria, Queen of Great Britain, and an alien, complains of John Hecker and George V. Hecker, who are citizens of the State of New York, residing in the city of New York, doing business in said city under the name and firm of Hecker & Brother; for that whereas heretofore, to wit, on the 26th day of August, 1853, at the said city of New York, by certain articles of agreement then and there made, concluded, and agreed upon between the said plaintiff, of the one part, and the said defendants of the other part, one of which said articles of agreement, sealed with the respective seals of said defendants, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, it was agreed by and between the said parties, among other things, that whereas letters patent had been granted by the government of the United States to the plaintiff for a new and useful improvement in the preparation of flour for bread making; and whereas the plaintiff was desirous of making arrangements for the manufacture and sale of said flour; and whereas the defendants were desirous of making such arrangements with the plaintiff; the said plaintiff should grant to the defendants the general right to manufacture and sell said flour, and the right to prepare and vend the ingredients according to said patent, to be incorporated with flour, giving and granting to the defendants the exclusive right to supply said city of New York with said flour and said ingredients for the then unexpired term of

said patent, so long as they should carry on said business with vigor and supply the demand therefor, and also such exclusive privilege of supplying such flour and ingredients, or either, to and for such other places in the United States as they might desire to supply, until the right for
3 such place should be disposed of, and the said plaintiff should maintain at his own expense the validity of said patent, and protect the defendants thereunder, while engaged in carrying on said business, and the said defendants should account and pay to the plaintiff twenty cents for and upon each barrel of the said flour manufactured and sold by them, and also in cases where they should prepare and vend the said ingredients to be incorporated with flour, at the rate of twenty cents upon so much and each quantity sufficient for a barrel of said flour, upon all the ingredients manufactured and sold by them. And for the due and faithful performance of said agreement, the plaintiff and each of the said defendants did thereby for himself, his heirs, executors, and assigns, covenant and agree with the other party to said agreement, his heirs, executors, or assigns, well and truly to observe and perform all the agreements therein mentioned, as by the said articles of agreement, reference thereunto being had, will amongst other things more fully and at large appear. And although the said plaintiff hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned in his part and behalf to be done and performed according to the tenor and effect, true meaning, and intent thereof, yet the plaintiff in fact saith, that although after the making of the said articles of agreement, to wit, on divers days and times between the said 26th day of August, 1853, and the 13th day of March, 1859, on which last mentioned day the term of said patent expired by its own limitation, the said defendants, at said city of New York,
4 under and by virtue of the powers and privileges in said articles of agreement contained, and thereby conferred on said defendants, manufactured and sold a large quantity, to wit, one hundred and fifty thousand barrels of said flour, and prepared and sold a large quantity of the ingredients according to said patent to be incorporated with flour, to wit, a quantity sufficient for one hundred and fifty thousand barrels of said flour, yet the said defendants did not nor would at any time after the 30th day of November, 1853, though thereto often requested, account to the plaintiff in respect to sales by them since said 30th day of November of said flour so by them manufactured and sold, nor in respect to sales by them since said 30th day of November of said ingredients so prepared and sold, and did not nor would at any time after said 30th day of November, though thereto often requested, pay or cause to be paid to the plaintiff the said sum of twenty cents for and upon each barrel of the said flour so manufactured and sold by said defendants since said 30th day of November, and for and upon each quantity of said ingredients sufficient for a barrel of said flour so prepared and sold by said defendants since said 30th day of November, as by said articles of agreement the said defendants had then and there covenanted and agreed to pay to the plaintiff, but wholly neglected and refused so to do; and on account thereof, a large sum of money, amounting in the whole to the sum of thirty thousand

dollars, became, and was, and still is due and payable to said plaintiff.

And so the plaintiff says, that the said defendants, although often
5 requested so to do, have not kept the said covenant and agreement so by them made as aforesaid, but have broken the same, and to keep the same with the said plaintiff, have hitherto wholly neglected and refused, to the damage of the plaintiff of thirty thousand dollars, and therefore he brings this suit, of the 15th day of September, 1859, at the city of New York.

And the said defendants, by James Monroe, their attorney, come and defend the wrong and injury when, &c., and say that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, because they say that the said plaintiff, in and by the said articles of agreement mentioned and referred to in the declaration herein, granted to the said defendants the exclusive right to manufacture and vend in the city of New York flour prepared as mentioned in the specifications annexed to the letters patent of the United States of America mentioned in the declaration herein, and the exclusive right to prepare and vend the ingredients of such prepared flour in the city of New York until the expiration of the said letters patent. And the said plaintiff, in and by the said agreement, agreed to maintain the validity of the said patent at his own expense, and to protect the said defendants from interference with their said exclusive right to manufacture and vend the said prepared flour and ingredients in the city of New York; but so it is that the said plaintiff did not maintain the validity of the said patent, and did not protect the said defendants from interference with their exclusive right to manufacture and vend the said prepared flour and
6 ingredients in the city of New York, but, on the contrary, similar prepared flour and similar ingredients were publicly manufactured and sold in the said city, to the great damage of these defendants and with the knowledge of the said plaintiff; and they deny that they have since then manufactured and sold the said prepared flour, or that they have prepared and sold the ingredients, according to said patent, to be incorporated with flour in the quantities or to the amounts set forth in the declaration. And this the said defendants are ready to verify; wherefore, they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And the said plaintiff replies to the plea of the defendants and says, that the plaintiff, by reason of anything by said defendants in their plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, because he saith that the facts stated in his declaration are true, and that the plaintiff did maintain the validity of said patent, and did protect the defendants from interference with their exclusive right to manufacture and vend under the same, and that the plaintiff fully kept and performed his covenant in regard thereto; and this the said plaintiff prays may be inquired of by the country and the defendants likewise

And these defendants further say, that the said plaintiff pretended and represented to the said defendants that the patent right referred to in the

said declaration was a good and valid right to the exclusive use of and property in the pretended improvement mentioned therein, and
7 that the said defendants believing and relying on the said representations of the said plaintiff, consented to enter into the agreement referred to in the said declaration. But these defendants show that the said patent right was, at the time of the making of the said articles of agreement, invalid and wholly worthless to the said defendants by reason that the composition of matter described in the specification thereof had been publicly known and used before the application for the said letters patent. And they show that Henry Jones, the alleged assignor to the said plaintiff of the said pretended invention or discovery, is not the original or first inventor or discoverer of the said alleged improvement, but, on the contrary, that the same had been previously publicly known and used in the United States, all of which was well known to the said plaintiff; and that prior to the thirteenth day of March, one thousand eight hundred and forty-five, the said patented invention or discovery had been described in numerous printed publications. And the said defendants further say, that, although the said plaintiff, in and by the said agreement, agreed to maintain the validity of the said patent at his own expense, and to protect the said defendants thereunder, yet that he did not maintain the validity of said patent, and did not protect the said defendants thereunder, and that, by reason of such default, neglect, and failure of the said plaintiff, the said defendants have suffered, and been put to great loss and damage, to wit, the sum of forty thousand dollars, which the defendants claim to recover.

8 And the said plaintiff, as to the amended plea or rejoinder of the defendants, saith that, by reason of anything by the said defendants therein alleged, the plaintiff ought not to be barred from having or maintaining his said action thereof against the said defendants, because he saith that the said patent right was a good and valid right, and that the plaintiff made no representations to the defendants in respect to said patent right which were not true, and that the plaintiff did maintain the validity of said patent and protect the said defendants thereunder, according to the terms of the said agreement. And this he prays may be inquired of by the country and the said defendants likewise, &c.

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN FOWLER
vs.
JOHN HECKER and GEORGE V. HECKER.

We hereby consent and agree to refer the above entitled suit to Henry A. Cram, Esq., of the city of New York, as sole referee, to hear and determine the same, and all the issues therein, with the same powers as the court, and that an order be entered making such reference, and that the report of said referee have the same force and effect as a judgment of said court.

Dec. 24, 1859.

H. & C. S. ANDREWS,
Pl'ff's Att'ys.

J. MONROE,
Def'ts' Att'y.

9 On reading and filing the annexed consent, and on motion of H. & C. S. Andrews, plaintiff's attorneys, ordered that this cause be referred to Henry A. Cram, Esq., of the city of New York, to hear and determine all the issues herein, with the fullest powers ordinarily given to referees, and that on filing of the report of the said referee with the clerk of this court, judgment be entered in conformity therewith the same as if the said cause had been heard before the court.

Dec. 29, 1859.

CHAS. A. INGERSOLL.

We consent to the within order.

H. & C. S. ANDREWS.

J. MONROE,
Def'ts' Att'y.

(Endorsed:) U. S. Circuit Court—John Fowler vs. John Hecker and George V. Hecker. Consent and order to refer.

H. & C. S. ANDREWS,
Pl'ff's Att'ys.

Filed April 3, 1860.

UNITED STATES CIRCUIT COURT—SOUTHERN DISTRICT OF NEW YORK.

JOHN FOWLER
vs.
JOHN HECKER and GEORGE V. HECKER.

I, Henry A. Cram, the referee, appointed by a rule of court, made in the above cause, having heard and examined the matters in controversy in said cause, and having examined, on oath, the several witnesses produced to me therein, do find that there is due to the above-named plaintiff, John Fowler, from the above-named defendants, John Hecker and George V. Hecker, the sum of nine thousand and five hundred dollars, besides costs—all which I do hereby respectfully report to this honorable court.

Dated the 17th day of June, 1861.

HENRY A. CRAM,
Referee.

(Endorsed:) U. S. Circuit Court—John Fowler vs. John Hecker and George V. Hecker. Report of referee.

Dated June 17, 1861.

Filed June 20, 1861.

10 That on filing the report of the referee with the clerk of the court, and on the application of the attorneys for the plaintiff, the said clerk thereupon entered judgment for the plaintiff against the defendants for the sum of nine thousand five hundred dollars, mentioned in said report, and for fifty-two dollars and fifty-five cents for costs and charges taxed.

Therefore it is considered that the said plaintiff do recover against the said defendants his damages aforesaid, by the referee aforesaid, in form

aforesaid reported, and also fifty-two dollars and fifty-five cents for his costs and charges now here adjudged to the said plaintiff, and with his assent; which said damages, costs, and charges, in the whole amount to nine thousand five hundred and fifty-two dollars and fifty-five cents.

Judgment signed this 20th day of June, 1861.

KENNETH G. WHITE,
Clerk.

11 In the Supreme Court of the United States of America, of December term, in the year of our Lord one thousand eight hundred and sixty.

JOHN HECKER and GEORGE V. HECKER
vs.
JOHN FOWLER.

Afterwards, to wit, on, &c., in this same term, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, come the said John Hecker and George V. Hecker, by J. Grenville Kane, their attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said John Fowler to have or maintain his aforesaid action against the said John Hecker and George V. Hecker.

There is also error in this, to wit, that the circuit court of the United States for the southern district of New York erred in ordering the hearing and determination of all the issues in the aforesaid action by a person called in said order a referee, an officer not known to the statutes or the common law, or to the practice of the said court.

There is also error in this, to wit, that the said so-called referee did not proceed in obedience to said order and in conformity thereto, in that said referee did not determine all or any of the issues in the

12 aforesaid action.

There is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said John Fowler against the said John Hecker and George V. Hecker, whereas by the law of the land the said judgment ought to have been given for the said John Hecker and George V. Hecker against the said John Fowler.

And the said John Hecker and George V. Hecker pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things that they have lost by occasion of the said judgment, &c.

J. GRENVILLE KANE,
Att'y for Pl'ffs in error.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

[L. S.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, or some of you, between John Fowler and John Hecker and George V. Hecker, manifest error hath appeared, to the great damage of the said John Hecker and George V. Hecker, as is said, and as appears by his complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the said Supreme Court may cause further to be done therein to correct the error, what of right and according to the law and custom of the United States ought to be done.

14 Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

KENNETH G. WHITE,
Clerk.

(Endorsed:) Writ of error—J. Monroe, pl'tff's att'y. Allowed June 29th, 1861. Samuel R. Betts, judge of U. S. Filed June 29th, 1861.

15 Supreme Court of the United States.

JOHN HECKER AND GEORGE V. HECKER, *plaintiffs in error,*
vs.
JOHN FOWLER, *defendant in error.*

Know all men by these presents, that we, John Hecker, George V. Hecker, Robert Murray, junior, and David Dows, are held and firmly bound unto the above named John Fowler, in the sum of nineteen thousand dollars, to be paid to the said Fowler, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and one and each of our heirs, executors, and administrators, firmly, by these presents.

Sealed with our seals, and dated this twenty-ninth day of June, in the year one thousand eight hundred and sixty-one.

Whereas, the above named John Hecker and George V. Hecker have

prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the hereinbefore entitled suit by the circuit court of the United States, for the second circuit and
16 southern district of New York, in favor of the above named defendant in error against the above named plaintiffs in error.

Now, therefore, the condition of this obligation is such, that if the above named John Hecker and George V. Hecker shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

Sealed and delivered in presence of—

JOHN HECKER. [L.S.]
GEORGE V. HECKER. [L.S.]
DAVID DOWS. [L.S.]
R. MURRAY, JR. [L.S.]

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss.:

Robert Murray, junior, and David Dow, being duly sworn, say, and each for himself says, that he is a resident and householder in the southern district of New York, and that he is worth the sum of nineteen thousand dollars over and above his just debts and liabilities and property exempt from execution.
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DAVID DOWS.
R. MURRAY, JR.

Sworn to this 29th day of June, 1861, before me,

ROB'T B. CAMPBELL,
Notary Public, C. & C., N. Y.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

On this 29th day of June, one thousand eight hundred and sixty-one, before me, personally appeared John Hecker, George V. Hecker, Daniel Dows, and Robert Murray, jr., to me known to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

ROB'T B. CAMPBELL,
Notary Public, C. C., N. Y.

(Endorsed:)

18 Bond on writ of error. J. Monroe, pl'ffs' atty. Upon the within evidence, I hereby approve of the within bond as to its form and the sufficiency of the security. New York, June 29, 1861. Samuel R. Betts, judge of the United States, southern district of New York. Filed June 29, 1861.

19 By the honorable Sam'l R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To JOHN FOWLER:

Whereas, John Hecker and George V. Hecker lately issued out of the Supreme Court of the United States, a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, stating, that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, between yourself, the said John Fowler, and the said John Hecker and George V. Hecker, a manifest error hath happened, to the great damage of the said John Hecker and George V. Hecker.

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the Capitol, in the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

SAM'L R. BETTS.

20 United States Circuit Court.

JOHN FOWLER
agt.
JOHN HECKER AND GEORGE V. HECKER.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. Grenville Kane, being duly sworn, says that on the first day of July instant, he handed a copy of the writ of error in this action to the clerk of this court, and procured the same to be signed by the said clerk, and then lodged the same in the office of the said clerk, by posting the same in a rack therein indicated by the said clerk as the proper place therefor. And that, according to the best recollection of this deponent, the said copy writ was endorsed in the said action, in the Supreme Court of the United States, and "copy of a writ of error lodged in pursuance of the statute of the United States, in such case made and provided, in the clerk's office, for the above named John Fowler, defendant in error."

J. GRENVILLE KANE.

Sworn to this 26th day of November, 1861, before me,

ROB'T B. CAMPBELL,
Notary Public.

21 Supreme Court of the United States.

JOHN HECKER AND GEORGE V. HECKER
agt.
JOHN FOWLER.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Michael J. Dunne, being duly sworn, says that on the first day of July, 1861, he served a copy of the citation and writ of error in this action on H. & C. S. Andrews, the attorneys for the said defendant in error in the court below, by delivering the same to one of the said attorneys personally.

MICHAEL J. DUNNE.

Sworn to this 26th day of November, 1861, before me,
ROB'T B. CAMPBELL,
Notary Public.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Tuesday the 22d day of November, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable SAMUEL NELSON,
Associate Justice of the Supreme Court United States.

JOHN HECKER AND GEORGE V. HECKER,
plaintiffs in error,
vs.
JOHN FOWLER.

22 On an application of the plaintiffs in error to amend the record in this case in pursuance of an order of the Supreme Court of the United States, and for which purposes the mandate was sent down, and having heard counsel for the respective parties; *ordered*, that the consent of the respective attorneys to a reference of the cause in the circuit court to Henry A. Cram, Esq., as referee, dated Dec. 24, 1859, and also the order of Judge Ingersoll, dated Dec. 29, 1859, and the report of the referee, dated 17th June, 1861, be inserted in the record in lieu of the first paragraph on page five, and that that paragraph be stricken out; and further, that the second paragraph on page five be stricken out, from the words, "and afterwards" down to the word "costs" inclusive.

And add in lieu thereof "that on filing the report of the referee with the clerk of the court, and on the application of the attorneys for the plaintiff to said clerk, the said clerk thereupon entered judgment for the plaintiff against the defendants for the sum of $9,500 mentioned in said report and for $52 55 for costs and charges taxed."

SAMUEL NELSON.

(Endorsed:)

U. S. Circuit Court. John Hecker and George V. Hecker, *vs.* John Fowler. Order amending record. Filed Nov. 22. 1864.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United
23 States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 10 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John Fowler, against John Hecker and George V. Hecker, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 1st day of December, in the year of our Lord, one thousand eight hundred and sixty-four and of the independence of the said United States, the eighty-ninth.

[L. S.] KENNETH G WHITE,
Clerk.

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Supreme Court of the United States.

JOHN HECKER and GEORGE V. HECKER,
Plaintiffs in Error,
vs.
JOHN FOWLER,
Defendant in Error.

This is a case brought before this Court, by a Writ of Error to the Circuit Court of the United States for the Southern District of New York.

The pleadings disclose that an action was brought by the Defendant in Error to recover damages for an alleged breach of a contract providing for the payment by the Plaintiffs in Error of a certain sum for the use of a patent. The Plaintiffs in Error allege, in their plea, that the Plaintiff below had violated his covenant to maintain the validity and their exclusive use of the patent; that the patentee was not the original inventor, but that the in-

vention had been described before his alleged discovery in books and publications, and that they had suffered heavy damages on account of the breaches of covenant by the Plaintiffs.

But there is no matter of law that arises upon the pleadings that this Court is asked to review and decide. The main question is, whether the judgment made a part of the record in the case is a valid judgment rendered by a judicial officer recognized by the laws of the United States, and which can be enforced by the courts of the United States.

It will appear from the record that while the case was pending the attorneys of the parties agreed to refer the case to a "Referee to hear and determine the same, and all issues therein, with the same powers as the Court, and that an order be entered making such reference, and that the report of said Referee have the same force and effect as a judgment of said Court."

One of the judges ordered, "that the cause be referred to Henry Cramm, Esq., of the City of New York, to hear and determine all the issues herein, with the fullest powers ordinarily given to Referees, and that on filing the report of the said Referee with the Clerk of the Court, judgment be entered in conformity therewith, the same as if the said cause had been tried before the Court."

The Referee proceeded to hear the case and made the simple finding, "that there is due to the above named Plaintiff, John Fowler, from the above named Defendants, John Hecker and George V. Hecker, the sum of nine thousand and five hundred dollars, besides costs; all

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which I do hereby respectfully report to the honorable Court."

Whereupon the attorneys of the defendant in error drew up the form of a judgment, and without the presence or action of the Court, except the order of reference already referred to, filed it as a judgment of the Court.

To understand a proceeding so unusual, and, as we believe, so illegal, when applied to the Courts of the United States, it will be necessary to refer to the statutes of New York. By reference to section 272 of the Code of the State of New York, it will be seen that a referee is clothed with the attributes of a judge. The trial by a referee is to be conducted in the same manner as a trial by the Court; he may grant adjournments, allow amendments to pleadings, compel the attendance of witnesses by attachment. His decisions may be excepted to, and revised in like manner, and with like effect in all respects as in cases of appeal from courts of record. It is also provided, that "the report of the referees upon the whole issue shall stand as the decision of the Court, and judgment may be entered thereon, in the same manner as if the action had been tried by the Court."

It has been decided in New York, that a referee is clothed with the power of a judge at Special Term. Graves *vs.* Blanchard, (4 How. N. Y. R.,) 300.

It will be observed that the referee did not decide the case in conformity with the order of the Court. He did not "determine all the issues in the case." But this writ is not brought to review the proceedings of the referee.

Here is a record of mixed proceedings, commenced before a judicial officer of the United States, conducted by a judicial officer unknown to the Courts of the United States, whose judgment, (or a paper purporting to be a judgment,) is filed in the office of the United States Circuit Court, attached to the pleadings by its Clerk, and made a part of the record in this case.

The proceedings of the referee and attorneys in this case have no analogy to the practice in the common law courts of England. Besides, the practice of those courts is regulated by, and depends upon, a statutory enactment which provides for a rule by which there may be a submission to arbitrators. (9 and 10 Wm. 3d, c. 18, sec. 1. Kyd on Awards, 21.) There is no statute of a similar character regulating the practice of United States courts.

There can be no question as to the irregularity of the proceedings. But will this Court entertain this Writ of Error?

There is nothing in the numerous decisions of this Court as to Writs of Error repugnant to the view that while the Supreme Court of the United States will not review the judgments of inferior courts made without the intervention of juries, or agreed statements of facts, it will at the same time exercise its superintending care in preventing the judgments of State judicial officers from being interpolated into the records of the Courts of the United States, and being enforced by the process of those courts.

Guild, et al., *v.* Frontin, 18 Howard.
Graham *v.* Bayne, 18 *Ib.*
Suydam *v.* Williamson, 20 *Ib.*
Ballance *vs.* Forsyth, 21 *Ib.*
Campbell *vs.* Bayreau, 21 *Ib.*

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We are aware that this Court has decided that "if the parties agree to submit the trial, both of fact and law, to the judge, they constitute him an arbitrator or referee, whose award must be final and conclusive between them, but no consent can constitute this Court appellate arbitrators."

But in this and the other cases cited, the judgment was rendered by a judge created by the laws of the United States, whose function it is to pronounce judgments in the Courts of the United States. In this record, there is no such judgment. While it is a judgment *in* the Circuit Court, and therefore within the language of Section 22 of the Judiciary Act of 1789, it is not a judgment *of* the Court.

This Court has recognized the modified application to the Supreme Court of the United States, of the rule that is applied by Justice Blackstone, to the King's Bench: "It is the peculiar business of the Court of King's Bench, to superintend all inferior tribunals and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them." 3 Blackstone, 110.

Error lies of any judgment in a Court of Record. Comyn's Digest, Pleading, Proceedings in Error, 3 B., 7.

Though it be void as out of the jurisdiction in an inferior Court.—*Ib.*

Though it be upon a writ of false judgment, for the last judgment is of record.—*Ib.*

We know of no adequate relief but in this Court. We

have refrained from an extended discussion of topics and authorities, because we are assured that the Supreme Court of the United States, while it protects its own dignity, will not sanction the confused and anomalous mingling of legal systems, state and national, which this record discloses, and will not permit the attorneys of parties or the judges themselves, to create judicial officers, whose decisions shall have the character and force of judgments of the Courts of the United States.

ELI P. NORTON,
Of Counsel for Plffs. in Error.

Sampson v. Parker 3 Webster 147

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Supreme Court

OF THE UNITED STATES.

No. 249.

JOHN HECKER and GEORGE V. HECKER,
Plaintiffs in Error,

vs.

JOHN FOWLER,
Defendant in Error.

In error to the Circuit Court of the United States for the Southern District of New York. 1

Brief and Points for Defendant in Error.

STATEMENT.

This was an action at law, to recover damages upon an alleged breach of covenant to pay a certain tariff for the use of a Patent, (folios 3 to 7.) It was commenced in the Circuit Court for the Southern District of New York, in September, 1859, (folios 2 and 7.)

The Circuit Court had jurisdiction of the subject matter, and of the parties, (folios 3 to 7.) 2

After issue joined, a rule was entered by the Court upon the consent of the respective parties, referring the cause to Henry A. Cram, Esq., of the city of New York, upon whom the parties had agreed as Referee, to hear and determine all the issues in the action, (fol. 10, p. 5.)

The parties also agreed, and the rule to refer ordered, that on the filing of the report of the Referee with the Clerk of the Court, judgment should be entered in con-
3 formity therewith, (fol. 10, p. 5.)

Said Referee made his report in favor of the plaintiff on the 17th day of November, 1861, by which he found that there was then due to the plaintiff from the defendants the sum of $9500, besides costs; and said report being filed, judgment was entered on the 20th day of November, 1861, in favor of the plaintiff for $9552 55, damages and costs, (fol. 11.)

The defendants sued out a writ of error, whereby the plaintiff has been hitherto delayed and prevented from
4 proceeding on his said judgment.

POINTS OF DEFENDANT IN ERROR.

POINT I.—The alleged errors assigned in this Court, present no ground for reversal of the judgment.

Those errors are four in number. The first and fourth are *the common errors*, and it is not supposed that the plaintiffs in error intend to claim anything under them.

The second error assigned is, that the Circuit Court erred in ordering the trial of the issues in the action by a Referee. (See Point II.)

5 The third error is, that the Referee did not determine

all of the issues in the action, as required to do by the Order of Reference.

The answer to this is:

First.—The Referee was not required, either by the agreement of the parties to refer, or by the order of reference entered upon such agreement, to *report* all the issues, but merely to *determine* them.

Second.—It does not appear from the return that the Referee *did not* determine all the issues in the 6
action, (fol. 11.)

Third.—It does appear by necessary implication, from his having found a sum certain due to the plaintiff, (fol. 11,) that the Referee must have determined all the issues; and it does not appear that any evidence was presented to the Referee upon any issue not specially noticed in the report.

Patterson v. Graves, 11 Howard's Practice Reports, N. Y., 91.

Fourth.—But if the Referee had been required to 7
report his findings on the several issues, and if the return showed that he had omitted so to do, such omission could only be taken advantage of by motion in the Court below.

Hulce v. Sherman, 13 Howard's Practice Reports, 411.

POINT II.—The judgment of the Circuit Court was a valid and final judgment between the parties.

First.—The reference was made in conformity with the agreement of the parties.

Second.—It has been repeatedly held by the Courts of 8
the State of New York, that where the parties

have agreed to refer a cause of action not referable under the Statute, and have further agreed that judgment shall be entered upon the Referee's report, a judgment so entered is valid, as being a judgment at common law upon the stipulation of the parties.

Bank of Monroe *v.* Widner, 11, Paige 529.
Green *v.* Patchin, 13 Wendell, 293.
Exparte Wright, 6 Cowen, 399.
9 Yates *v.* Russell, 17 Johns R., 461.
Hughes *v.* Bywater, 4 Hill, 551.
Silmser v. Redfield, 19 Wend. R. 21.

Third.—It was a valid judgment, according to the decisions of this Court.

Gould, et al., *v.* Frontin, 18 Howard, 135.
Kelsey, et al., *v.* Forsyth, 21 Howard, 85.
Campbell, et al., *v.* Boyreau, 21 Howard, 223.
U. S. v. Rathbone, 2 Paine (C. C. R. 578.

POINT III.—The facts in this case not having been found either by a general or special verdict, nor agreed
10 upon in a case stated, and there being no Bill of Exceptions, there are no questions open to the revision of the Appellate Court, but this Court will affirm the judgment of the Court below.

Graham *v.* Bayne, 18 Howard. 60.
Guild. et al, *v.* Frontin, 18 Howard, 135.
Kelsey, et al, *v.* Forsyth, 21 Howard, 85
Campbell, et al., *v.* Boyreau, 21 Howard, 223.

POINT IV.—The judgment below should be affirmed, with damages, at the rate of ten per centum per annum
11 on the amount of the judgment.

Rule 23, subdivision 2.
Kilbourne *v.* State Savings Institution of St. Louis, 22 Howard, 503.
Jenkins, et al, *v.* Banning, 23 Howard, 455.

HORACE ANDREWS,
Of Counsel for the Defendant in Error.